

DECISION DOCUMENT:

**APPROVAL OF THE SWINOMISH INDIAN TRIBAL COMMUNITY
APPLICATION FOR TREATMENT IN THE SAME MANNER AS A STATE
FOR SECTIONS 303(c) AND 401 OF THE CLEAN WATER ACT**

2. Identification of Surface Waters for which the Tribe Proposes to Establish Water Quality Standards.

The Tribe's Application states that the Tribe's water quality standards will apply to all waters within the existing boundaries of the Reservation, as described in the Treaty of Point Elliot of 1855 and modified by an Executive Order of September 1873. The Reservation consists of all the lands and waters within the exterior boundaries of the Reservation. For purposes of the TAS Application, the Reservation includes tidelands surrounding the Reservation and the waters which overlie the tidelands, and the area known as McGlinn Island and other parcels of land east of the Swinomish Channel described in the Second Supplemental Submission. The tidelands extend to the extreme low water mark of the south, west, and north sides of the Reservation, which border waterways, and include the Swinomish Channel, at least to the historical midpoint of the Slough.

The Application specifically identifies the following 13 water bodies that are wholly or partially within the Reservation boundaries.

1. Padilla Bay
2. Padilla Bay Lagoon
3. Similk Bay
4. Turner's Bay
5. Kiket Bay
6. Lone Tree Lagoon
7. Lone Tree Creek
8. Skagit Bay
9. Skagit River Delta
10. Snee-Oosh Creek
11. Swinomish Channel
12. Munks Creek
13. Fornsby Creek

The SITC also proposes to establish standards for all named and unnamed palustrine and marine wetlands, named and unnamed intermittent streams, unnamed springs and seeps, and all delineated, inventoried, undelineated, and uninventoried wetlands wholly or partially within the Reservation boundaries.

EPA has determined that the Tribe has satisfied 40 C.F.R. § 131.8(b)(3)(iii) by identifying the surface waters over which it proposes to establish water quality standards.

3. Statement describing basis for the Tribe's authority over Reservation Waters

The Swinomish Indian Tribal Community has identified the legal authorities pursuant to which the Tribe performs its governmental functions. The Application and supplemental submissions include statements by the Tribe's legal counsel describing the basis of the Swinomish Indian Tribal Community's authority. The Swinomish Indian Tribal Community is organized pursuant to a Constitution and By-Laws originally adopted in 1935. The Swinomish Indian Tribal Community is governed by its constitutionally-formed Swinomish Senate and the General Council, which includes the voting population of the Tribe. The Constitution provides specific powers for the Tribe to exercise civil regulatory authority over ground and surface water pollution on the Reservation.

CWA Section 518(e)(2) authorizes EPA to treat a tribe in the same manner as a state for water resources "within the borders of an Indian reservation". EPA has interpreted this provision to require that a tribe show authority over the water resources for which it seeks TAS approval. 56 Fed. Reg. at 64880. The Tribe has asserted that it has authority to set water quality standards and issue certifications for all surface waters, including those that it has identified, that are within the Reservation boundaries as described in the Application. As explained in the analysis below, which also considers the information contained in the Findings of Fact of Appendix I to this Decision Document, EPA is determining that the Swinomish Indian Tribal Community has inherent authority over nonmember activities for purposes of the water quality standards and water quality certification programs under the Clean Water Act.

EPA analyzes a tribe's water quality authority under the CWA over activities of nonmembers on nonmember-owned fee lands under the test established in *Montana v. United States*, 450 U.S. 544 (1981) (*Montana test*). In *Montana*, the Supreme Court held that absent a federal grant of authority, tribes generally lack inherent jurisdiction over nonmember activities on nonmember fee land. However, the Court also found that Indian tribes retain inherent sovereign powers to exercise civil jurisdiction over nonmember activities on nonmember-owned fee lands within the reservation where (i) nonmembers enter into "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" or (ii) "...[nonmember] conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* At 565-66. In analyzing tribal assertions of inherent authority over nonmember activities on fee lands on Indian reservations, the Supreme Court has reiterated that the *Montana* test remains the relevant standard. See, e.g., *State v. A-1 Contractors*, 520 U.S. 438, 445 (1997) (describing *Montana* as "the pathmarking case concerning tribal civil authority over nonmembers"); see also *Nevada v. Hicks*, 533 U.S. 353, 358 (2001) ("Indian tribes' regulatory authority over nonmembers is governed by the principles set forth in [*Montana*]").

In the preamble to EPA's 1991 water quality standards regulation, the Agency noted that, in applying the *Montana* test and assessing the impacts of nonmember

activities on fee lands on an Indian tribe, EPA will rely upon an operating rule that evaluates whether the potential impacts of regulated activities on the tribe are serious and substantial. 56 Fed. Reg. at 64878-79. EPA also recognized that the analysis of whether the *Montana* test is met in a particular situation necessarily depends on the specific circumstances presented by the tribe's application. *Id.* at 64878. In addition, EPA noted as a general matter "that activities which affect surface water and critical habitat quality may have serious and substantial impacts" and that, "because of the mobile nature of pollutants in surface waters and the relatively small length/size of stream segments of other water bodies on reservations. . . any impairment that occurs on, or as a result of, activities on non-Indian fee lands [is] very likely to impair the water and critical habitat quality of the tribal lands." *Id.* EPA also noted that water quality management serves the purpose of protecting public health and safety, which is a core governmental function critical to self-government. *Id.* at 64879.

The Clean Water Act addresses the maintenance and restoration of the physical, chemical, and biological integrity of waters of the United States, including tribal waters, by providing that tribes treated in the same manner as states, act to "prevent, reduce, and eliminate pollution." CWA Section 101(b). CWA Section 518(e) authorizes tribes to carry out CWA functions that "pertain to the management and protection" of reservation water resources. The *Montana* test analyzes whether the tribe is proposing to regulate activity that "threatens" or "has some direct effect" on tribal political integrity, economic security, or health or welfare. That test does not require a tribe to demonstrate to EPA that nonmember activity "is actually polluting tribal waters," if the tribe shows "a potential for such pollution in the future," *Montana v. EPA*, 141 F. Supp. 2d 1249, 1262 (D. Mont. 1998), quoting *Montana v. EPA*, 941 F. Supp. 945, 952 (D. Mont. 1996), *aff'd* 137 F.3d 1135 (9th Cir. 1998), *cert denied* 525 U.S. 921 (1988). Thus, EPA considers both actual and potential nonmember activities in analyzing whether a tribe has authority over nonmember activities under the Clean Water Act.

EPA recognizes that under well-established principles of federal Indian law, a tribe retains attributes of sovereignty over both its lands and its members. *See e.g. California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); *U.S. v. Mazurie*, 419 U.S. 544, 557 (1975). Further, tribes retain the "inherent authority necessary to self-government and territorial management" and there is a significant territorial component to tribal power. *Merrion v. Jicarilla Apache Tribe*, 450 U.S. 130, 141-142. *See also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980) (significant geographic component to tribal sovereignty).

A tribe also retains its well-established power to exclude non-members from tribal land, including "the lesser power to place conditions on entry, on continued presence, or on reservation conduct." *Merrion*, 455 U.S. at 144. Thus, a tribe can regulate the conduct of persons over whom it could "assert a landowner's right to occupy

¹ EPA has not resolved whether it is necessary to analyze under the *Montana* test the impacts of nonmember activities on tribal/trust lands, such as those covered in this Application, to find that a tribe has inherent authority to set water quality standards for such areas. EPA believes, however, that, as explained in this Decision Document, the Tribe could show authority over nonmember activities on tribal/trust lands covered by the Application under the *Montana* "impacts" test.

and exclude." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 651-652 (2001), quoting *Strate*, 520 U.S. at 456.

The Application describes in detail the importance of surface water quality to the Swinomish Indian Tribal Community and the many ways the Tribe and its members use surface waters. Maps provided by the Swinomish Indian Tribal Community show all the waters within the Reservation. Uses of the water by the Tribe and its members that the Tribe seeks to protect include subsistence, ceremonial, and commercial fishing and shellfish harvesting, wildlife habitat, recreation in and on the water, and cultural uses and domestic uses. The Tribe has asserted that impairment of such water on the Reservation would have a serious and substantial effect on the political integrity, economic security, or health or welfare of the Swinomish Indian Tribal Community and its members.

The Application describes the topography of the Reservation, which creates surface water drainage patterns where waters flow freely from lands owned by the Tribe or Tribal members to nonmember-owned land or from nonmember to Tribal land. Virtually all of the water that falls onto or passes through the Swinomish Reservation either discharges to the resource-rich tidelands and/or estuaries of the Swinomish Indian Tribal Community, and/or contributes to the recharge of aquifers that supply drinking water to residents of the Reservation. Storm water from both member and nonmember lands is generally combined in outfalls that discharge to tidelands, due to the interspersed pattern of land ownership within the Reservation boundaries.

As explained more fully below and described in Appendix I, the Tribe supported its claims with information about how it and its members use the waters and with information showing how current and potential nonmember activities on the Reservation have or may have serious and substantial direct effects on the Tribe's political integrity, economic security, and health and welfare.

The First Supplemental Submission describes in detail the leasing of trust lands within the Reservation to nonmembers for a variety of purposes, including industrial, commercial, agricultural, residential and recreational purposes. Those activities generally have similar effects on the Tribe and its members when carried out on trust lands that they have when carried out on nonmember fee lands. Approximately 970 acres of the 4,610 acres of upland trust lands (21%) are leased to nonmembers. See Map 3, Swinomish Indian Reservation – Leased Areas and Tribal Enterprises (2007), Exhibit 8 to First Supplemental Submission. For the most part, nonmember activities on trust lands within the Reservation are authorized by the Tribe or a member of the Tribe through lease arrangements governed by 25 U.S.C. § 415 and BIA regulations at 25 C.F.R. Part 131. The leases specifically incorporate federal regulations at 25 C.F.R. Part 162 by reference. The presence of nonmembers on such lands within the Reservation is usually only by permission from the Tribe or a Tribal member, and the Tribe or Tribal member may exclude nonmembers from lands to which the Tribe or their members hold the fee or beneficial title.